TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 190.

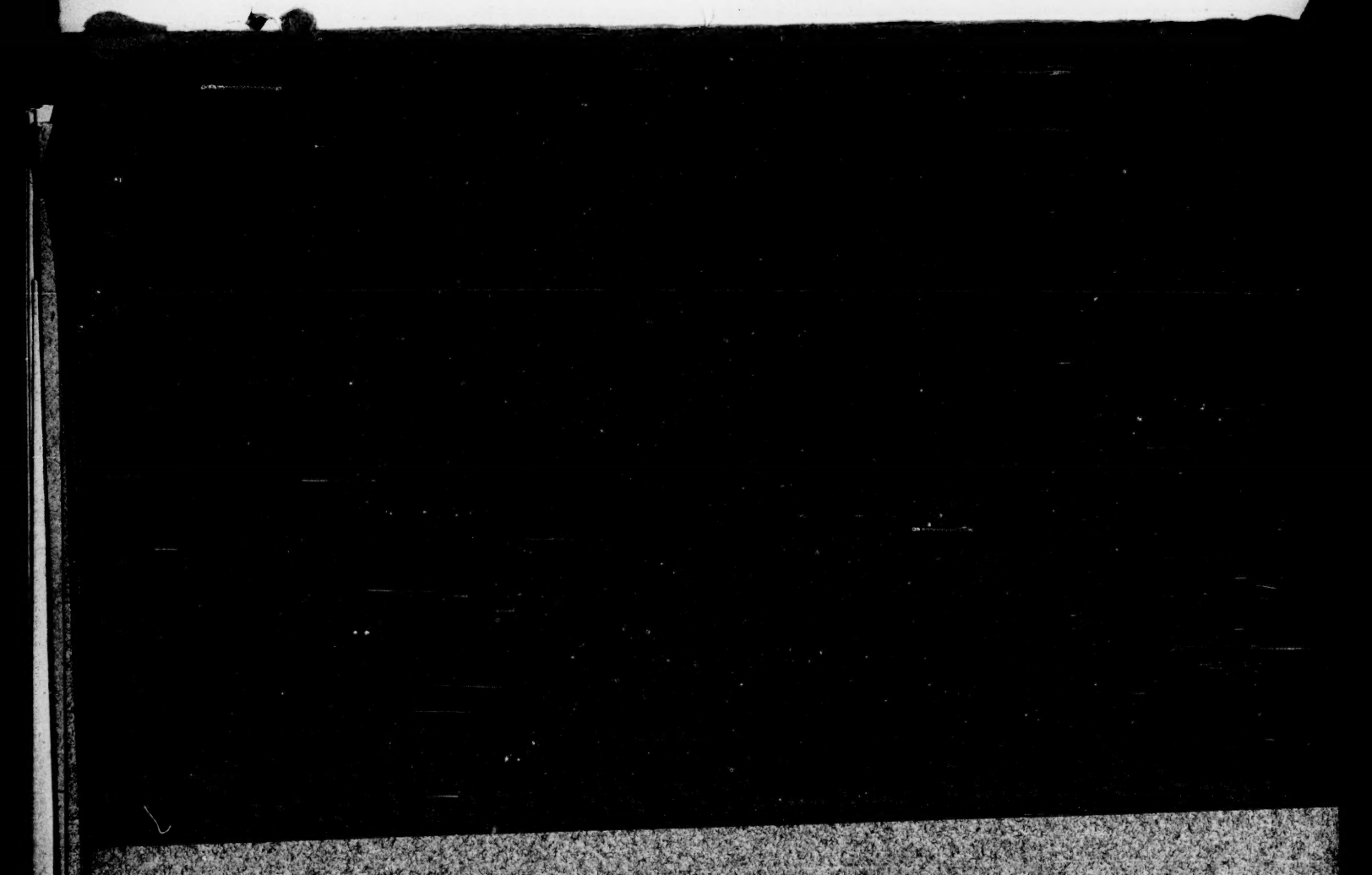
JAMES E. YEATMAN AND JAMES C. MOORE, ASSIGNEES IN BANKRUPTCY OF JAMES J. O'FALLON AND SAMUEL A. HATCH, COMPOSING THE FIRM OF O'FALLON & HATCH, PLAINTIFFS IN ERROR,

vs.

PIERCE BUTLER AND WILLIAM SHIELDS, EXECUTORS OF DR. W N. MERCER, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 12, 1875.



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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana

ROBERT K. WOODS, ASSIGNEE, &C., *vs.* D'R W. N. MERCER. } No. 6887.

Petition.—Filed January 18th, 1873.

To the hon. the circuit court of the United States for the fifth judicial circuit and district of Louisiana:

The complaint of Robert K. Woods, who is a citizen of the State of Missouri, and herein acting as the assignee of O'Fallon & Hatch in bankruptcy, respectfully shows unto the court that the commercial firm and copartnership of O'Fallon & Hatch, and the individual members thereof composing said firm, to wit, James J. O'Fallon and Samuel A. Hatch, were adjudged bankrupt, as a firm and as individuals, under and in virtue of the act of Congress approved March 2nd, 1867,
2 entitled "An act to establish a uniform system of bankruptcy throughout the United States," by the district court of the United States for the eastern district of Missouri, on the 27th day of November, A. D. 1871, as will more fully appear from the copy of said adjudication herewith filed and made part hereof, marked "A."

That on the 20th day of May, 1872, your petitioner was duly appointed assignee of said bankrupt firm and the members thereof aforesaid, as will appear from the copy of said appointment herewith filed and made part hereof, marked "B."

That on the said 20th day of May, 1871, the register in bankruptcy for said district court of Missouri did, by proper and usual deed of assignment, convey to your petitioner all the property and rights of property of every description belonging to said estate in bankruptcy, or in which they were interested, on the 9th day of September, 1871, which will more fully appear from the said deed of assignment, a copy of which is hereto attached and made part hereof, marked "C."

That among the assets belonging to said estate of O'Fallon & Hatch, and so conveyed to your petitioner as assignee aforesaid and which formed part of their estate on the day they were adjudicated bank-
3 rupt, there were ten certificates of indebtedness of the State of Louisiana, each for the sum of five thousand dollars, numbered from 150 to 160, in all amounting to the sum of fifty thousand dollars; that said certificates were in the possession of D'r William N. Mercer, of the city of New Orleans, also a citizen of the State of Louisiana, at the time said adjudication of bankruptcy of said firm was made; that said certificates were truly and lawfully the property said bankrupt estate, and did not belong to said defendant, D'r William N. Mercer.

That in the months of January and February, 1872, at divers times, Leonard Matthews, the duly appointed, authorized, and qualified receiver of the estate and assets of said firm of O'Fallon & Hatch in bankruptcy, with full powers to receive said certificates, and to sell and convert same into money, upon producing his papers verifying his aforesaid authority, demanded from the defendant, D'r W. N. Mercer, the possession of said certificates of indebtedness for the purpose of selling same, there being then a great demand for such securities in this market; that at that time said securities were worth the full sum

of seventy-two cents on the dollar; that thereupon said defendant,
4 W. N. Mercer, refused to surrender or deliver same to said receiver, Leonard Matthews, but illegally and wrongfully detained the same from him and converted the same to his own use, when in reality the said assets were the property of said estate, and should have been delivered by him to the said receiver, Leonard Matthews.

That he still refuses to surrender said assets to your petitioner, or to pay over the value of said assets to petitioner, to wit, the sum of thirty-six thousand dollars and interest on same from February 28th, 1872, at the rate of eight per cent. per annum, though amicable demand has been made upon him, the said defendant.

That said sum with said interest is still due, owing, and unpaid from said W. N. Mercer to your petitioner, together with his reasonable attorneys' fees in this case, to wit, the sum of twenty-five hundred dollars.

Wherefore your petitioner prays that said defendant, D'r William N. Mercer, be cited to answer this petition, and that he be condemned
5 to pay to your petitioner the full value of said certificates of indebtedness at the time they were demanded from defendant, on February 28th, 1872, to wit, the sum of thirty-six thousand dollars, with interest on same at 8 % per annum from 28th February, 1872, till paid, and for twenty-five hundred dollars attorneys' fees, and for costs and general relief.

(Sign'd) GIVEN CAMPBELL,
Att'y for Plaintiff.

Citation and marshal's return.—Issued January 18th, 1873.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

ROB'T K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

You are hereby commanded to summon D'r William N. Mercer, a citizen of the State of Louisiana, to comply with the demand of Robert K. Woods, assignee in bankruptcy of O'Fallon & Hatch, and a citizen of the State of Missouri, contained in the petition, of *of* which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial
6 circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held.

And that you make due return hereof on the first Monday of February, 1873.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 18th day of January, A. D. one thousand eight hundred and seventy-three, and of the Independence of the United States of America the 97th year.

[SEAL.] (Signed) F. B. VINOT, *D'y Clerk.*

Marshal's return.

Received January 21st, 1873, by the U. S. marshal, and on the 23d day of same month and year served a copy of within citation and accompanying petition on D'r W'm N. Mercer, named herein, by handing the same to him in person.

New Orleans, Jan. 23d, 1873.

(Signed) S. W. REED,
D'y U. S. Marshal.

7 *Answer.—Filed February 7th, 1873.*

U. S. circuit court, fifth circuit and district of Louisiana.

ROBERT K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

Now comes the defendant, William Newton Mercer, and for answer to the petition of Robert K. Woods, assignee in the above-entitled cause, says he denies all and singular the allegations thereof, except such as are hereinafter specially admitted.

He denies specially the power and authority of Leonard Mathews as alleged.

Further answering, he saith that he holds ten certificates of indebtedness of the State of Louisiana for the sum of five thousand dollars each, amounting to $50,000, numbered from 150 to 160; that he acquired the same in due course of business and for a valuable consideration, on the 10th day of July, 1871, or thereabouts, by virtue of a pledge and pawn executed by the firm of O'Fallon & Hatch, dated 10th July, 1871, to him to secure the payment of three promissory notes then delivered to
8 him for a valuable consideration and in due course of business, one for ten thousand dollars, payable on the 10th January, 1873; one for ($10,000) ten thousand dollars, payable on the 5th January, 1872; and one for ($5,000) five thousand dollars, payable on the 12th of January, 1872, with interest after maturity at eight per cent. per annum, all dated on the 10th of July, 1871, and signed by O'Fallon & Hatch, and payable to their own order, and by them endorsed in blank, which said notes are due and unpaid. That Louis F. Générés claims a second lien thereon for $2,500.

Wherefore he prays judgment against the said plaintiff with costs.

(Signed) CLARKE, BAYNE & RENSHAW,
For Def't.

Waiver of jury.—Filed May 22d, 1873.

U. S. circuit court, fifth circuit and district of Louisiana.

R. K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JOHN A. TURNELL. } No. 6888.

9 SAME *vs.* S. SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

We agree to waive the jury in these cases, and that the same be tried by the court.

Signed LEA, FINNEY & MILLER, *For S. Smith & Co.*

" CLARKE, BAYNE & RENSHAW, *For other Defendants.*

" GIVEN CAMPBELL, *Att'y for Plaintiff.*

Continuance of case.—Extract from minutes May 22d, 1873.

U. S. circuit court, 5th circuit & district of Louisiana. April term, 1873.

NEW ORLEANS, *Thursday, May 22d*, 1873.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

ROBERT K. WOODS, ASSIGNEE, &c., *vs.* D'R W'M N. MERCER. } No. 6887.

10 SAME *vs.* JNO. A. TURNELL. } No. 6888.

SAME *vs.* S. SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* N. O. SAVINGS INSTITUTION. } No. 6886.

In the above cases the attorneys this day filed a stipulation waiving the jury, and agreed to try the causes before the court on Monday, 26th instant, at 11 a. m., for which day they are specially assigned.

Hearing and continuance of case.—Extract from minutes May 26th, 1873

R. K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JNO. A. TURNELL. } No. 6888.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

11

The above cases were called and, by consent of counsel, tried together.
Given Campbell for plaintiff.
Clarke, Bayne & Renshaw for defendants.
When, after hearing the pleadings, evidence, and argument, the further hearing is continued till to-morrow at 11 a. m.

Hearing and submission of case.—Extract from minutes May 27th, 1873.

R. K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JNO. A. TURNELL. } No. 6888.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

The above cases were resumed, and, after hearing further evidence and argument, the court took time to advise.

Order case re-instated and fixed.—Extract from the minutes, December 9th, 1873.

12 U. S. circuit court, 5th circuit & district of Louisiana, November term, 1873.

NEW ORLEANS, *Tuesday, December 9th*, 1873.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

R. K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JNO. A. TURNELL. } No. 6888.

SAME
vs.
S. SMITH & CO. } No. 6889.

SAME
vs.
L. F. GÉNÉRÉS. } No. 6890.

SAME
vs.
N. O. SAVINGS INSTITUTION. } No. 6886.

Ordered, that the above causes submitted at the last term of the court be re-instated for further argument on the 30th instant, at 11 a. m., and that all parties be notified thereof.

Motion and order case continued.—Extract from the minutes, January 10th, 1874.

R. K. WOODS, ASSIGNEE, &C., *vs.* DR' W'M N. MERCER. } No. 6887.

13 SAME *vs.* JNO. A. TURNELL. } No. 6888.

SAME *vs.* S. SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* N. O. SAVINGS INSTITUTION. } No. 6886.

On motion of Given Campbell, attorney for plaintiff, ordered, that the above cases be set for further argument on the 16th instant, at 11 a. m., and that defendants be notified thereof.

Hearing and continuance of cases.—Extract from the minutes, January 16th, 1874.

R. K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JNO. A. TURNELL. } No. 6888.

SAME *vs.* S. SMITH & CO. } No. 6889.

14 SAME
vs.
L. F. GÉNÉRÉS. } No. 6890.

SAME
vs.
N. O. SAVINGS INSTITUTION. } No. 6886.

The above cases were called for re-argument pursuant to order.
Present, Given Campbell, for plaintiff.
Finney & Miller, Clarke, Bayne & Renshaw, for defendants.
When, after hearing Given Campbell & H. C. Miller, esq'r's, ordered, that the further hearing be continued till the 19th instant, at 11 a. m.

Hearing and submission of cases.—Extract from the minutes, January 19th, 1874.

R. K. WOODS, ASSIGNEE, &C.,
vs.
D'R W'M N. MERCER. } No. 6887.

SAME
vs.
JNO. A. TURNELL. } No. 6888.

SAME
vs.
S. SMITH & CO. } No. 6889.

SAME
vs.
L. F. GÉNÉRÉS. } No. 6890.

SAME
vs.
N. O. SAVINGS INSTITUTION. } No. 6886.

15 The above causes were resumed, and, after hearing further argument, the court took time to advise.

Judgment.—From judgment-book, March 3d, 1874.

Circuit court of the United States, fifth circuit & district of Louisiana.
November term, 1873.

NEW ORLEANS, *Tuesday, March 3rd*, 1874.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.
" Hon. E. H. Durell, district judge.

R. K. WOODS, ASSIGNEE, &C.,
vs.
D'R WILLIAM N. MERCER. } No. 6887.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that judgment be entered for the defendant, with costs.
Judgment rendered March 3d, 1874.
Judgment signed March 7th, 1874.
(Signed) E. H. DURELL, *Judge.*

Statement of facts by the court.—Filed June 16th, 1874, nunc pro tunc, as of March 3rd, 1874.

U. S. circuit court, dist. of L'a.

ROBERT K. WOODS, ASSIGNEE, &C., *vs.* D'R W'M N. MERCER. } No. 6887.

16 This cause came up this day for trial.

Present, Given Campbell, for plaintiff, and Clarke, Bayne & Renshaw for defendant.

After hearing evidence and argument, and upon counsel filing a stipulation for the waiver of the jury, the court finds the following facts, to wit:

ROBERT K. WOODS, ASSIGNEE, &C., *vs.* D'R W. N. MERCER. } No. 6887.

Defendant is holder of ten certificates of indebtedness of the State of Louisiana, Nos. 150 to 160, for fifty thousand dollars, pledged to him on the 10th July, 1871, by O'Fallon & Hatch, to secure their three promissory notes then delivered, one for ten thousand dollars, payable 5th January, 1872; one for ten thousand dollars, payable 10th January, 1872; and one for five thousand dollars, payable 12th January, 1872, with eight per cent. per annum interest after maturity, payable to their own order and by them endorsed in blank.

That said notes were acquired by defendant for a valuable consideration, and in due course of business.

17 That said notes remain unpaid in defendant's hands.

That the things pledged are those claimed in plaintiff's petition.

That O'Fallon & Hatch were decreed bankrupts on 27th November, 1871, by the United States district court for the State of Missouri.

That Leonard Mathews was by an ex-parte order appointed receiver, as follows:

United States district court, eastern district of Missouri. In bankruptcy.

IN THE MATTER OF JAMES J. O'FALLON AND Samuel A. Hatch, bankrupts. } No. 949.

At S't Louis, in said district, Saturday, 2d day of December, A. D. 1871.

This day comes Archie Woods & William H. Mathews, petitioning creditors herein, by their attorneys, Mess'rs Hendershott & Chandler, and present to the court their petition heretofore filed herein, praying for the appointment of a receiver of the estate & effects of said bankrupts for the reasons and subject to the terms and conditions in said petition stated.

18 And the court having considered said petition, and being fully advised in the premises, it is ordered that Leonard Mathews, esquire, of the city and county of S't Louis, in said district, be, and he is hereby, appointed receiver of the estate and effects of the copartnership composed of said James J. O'Fallon and Samuel A. Hatch, and also of the individual estate and effects of said bankrupts respectively.

And the said Mathews having filed a bond herein with sureties, approved by the court, in the sum of ten thousand dollars, he is hereby ordered to take possession of the goods, property, and effects of the said bankrupts, both of the said copartnership and of said O'Fallon & Hatch, individually, and the same hold until the further order of this court.

And it is further ordered that until the further orders of this court herein the said receiver be authorized to ask, demand, and receive, from any and all persons from whom the same may be due and owing, any and all sum or sums of money and any and all property of
19 what kind soever belonging to said bankrupts, either as members of said copartnership or individually.

Also to ask for, demand, and receive any and all books, papers, and accounts of any kind whatsoever belonging to said firm or to said individuals, bankrupts, except such assets, books, papers, and accounts as may be in the possession of Samuel L. James, hereinafter mentioned.

And he is further authorized to make all disbursements necessary for the interests of said estate, especially for the proper keeping of certain valuable live-stock belonging to said bankrupts.

And it is further ordered that the order heretofore made by this court appointing Samuel L. James receiver of the interests of said estate in the State of Louisiana continue in force, and that he report to and act under the said Mathews, receiver, until the further order of this court.

And it is also ordered that said Mathews keep an account of all moneys by him received and expended in any wise pertaining to this estate, in pursuance of this order.

20 That under that order he came to New Orleans and demanded, on the day of January, 1872, of L. F. Générés, the unconditional delivery to him of said certificates of indebtedness held by defendant; that Générés refused to deliver unless the amount of the aforesaid notes held by defendant was paid to him; but offered to deliver the certificates, or have the same sold, provided the amount of said notes was left in the hands of M'r Carl Kohn, the agent here, to be retained here until proof was filed in the Missouri court.

That on the 27th day of February, 1872, the district court of the United States for Missouri entered the following order:

United States district court, eastern district of Missouri. In bankruptcy.

IN THE MATTER OF JAMES J. O'FALLON AND Samuel A. Hatch, bankrupts. } No. 949.

At S't Louis, in said district, Tuesday, 27th February, A. D. 1872.

This day comes Leonard Mathews, receiver herein, and presents
21 to the court his petition this day filed herein, praying an order for the sale of the warrants and certificates of indebtedness of the State of Louisiana which have been pledged for debts by said bankrupts, and the court having heard said petition, and being fully advised in the premises, doth order that said Leonard Mathews, receiver aforesaid, be, and he is hereby, authorized and empowered to sell and transfer all such warrants and certificates as may be delivered to him for that purpose by the holders thereof, at a price not less than seventy-two (72) per cent. for warrants, and sixty (60) per cent. for certificates, and to receive the proceeds thereof, to be by him held subject to the future order of this court, reserving to said holders the same right of liens upon such proceeds as they may have upon said warrants and certifi-

cates, and to have the said proceeds applied, as far as necessary, in payment of their debts, upon due proof and allowance of such debts and securities in this court.

That Mathews telegraphed to Carl Kohn as follows:

FEBRUARY 27TH, 1872.

22 CARL KOHN,
Care Union National Bank, New Orleans:

Court authorizes me to sell all certificates and warrants that the holders may deliver me, at not less than sixty per cent. for certificates and seventy-two per cent. for warrants, I to hold money until creditors prove their claims in this court. Creditors' lien on proceeds of sale in my hands reserved same as the collaterals.

Act as my agent to receive and sell in my name. Show this to Smith, Générés, and Irwin, and ask them to deliver. Promptness necessary.

(Signed) LEONARD MATHEWS,
Receiver of O'Fallon & Hatch.

That this was communicated by Kohn to Générés, who refused to deliver the said certificates unless so much of the proceeds of sale as would pay the debt due defendant was retained here by Kohn, and upon these terms Générés represented that defendant would proceed to prove his debt.

That on the 20th day of May, 1872, the plaintiff was appointed
23 and qualified assignee of O'Fallon & Hatch, and received a proper deed of assignment of the bankrupt' assets.

On the 7th day of June, 1872, the following order was entered by the district court of the United States for Missouri:

United States district court, eastern district of Missouri. In bankruptcy.

IN THE MATTER OF JAMES J. O'FALLON AND Samuel A. Hatch, bankrupts. } No. 949.

At S't Louis, in said district, Friday, 7th June, A. D. 1872.

This day comes Rob't K. Woods, assignee of the estate of said bankrupts, by Samuel S. Boyd, his attorney, and, on motion of said attorney, it is ordered by the court that said Rob't K. Woods, assignee aforesaid, be, and he is hereby, authorized to appear in the district court of the United States for the district of Louisiana, and in any and all other courts in the State of Louisiana, and take such action with respect to any demands, suits, or applications therein pending or hereafter instituted at the instance of any person or persons whosoever, as may be necessary, meet, and proper to enable him to defeat any and all
24 attempts to interfere with his rights and duties as assignee aforesaid, or to prevent him from obtaining full, undisturbed, and complete possession and control of the copartnership estate and effects of O'Fallon & Hatch, and also the undivided estates and effects of said James J. O'Fallon & Samuel A. Hatch, and to do all and singular that may be meet and proper to obtain possession and control of all the said estates and effects, and books, papers, and documents belonging thereto, and to defeat any interference with his rights and duties as assignee aforesaid.

And said assignee is hereby authorized and directed to collect all moneys due to the said copartnership and individual estates, and to ad-

just or compromise all claims to any effects belonging thereto, and to sell at public or private sale any collaterals belonging to said estates said to be pledged for certain demands against said estates, and now in the possession of persons residing in said State of Louisiana, claiming to be creditors of said estates.

The plaintiff visited New Orleans, arriving there on the 17th June, 1872, and remained there till the 22d of same month, on business
25 connected with the collaterals held by the creditors of O'Fallon & Hatch. He had a copy of the adjudication in bankruptcy, a copy of the appointment as assignee, a copy of the assignment of bankrupts' effects, and a copy of the order of the United States district court in relation to these collaterals.

He saw Générés and showed him all the papers mentioned. He had three or four interviews with Générés while in New Orleans. He demanded of Générés the certificates of indebtedness held by defendant, which plaintiff claimed belonged to the estate of O'Fallon & Hatch, and Générés refused to deliver said certificates unless plaintiff would pay the debt for which defendant claimed they were held as collateral security, which plaintiff declined to do.

That Générés had no authority to act for defendant; but he told defendant afterwards what he had done and defendant approved it.

That on the 22d of June, 1872, the plaintiff handed to Générés the following document, which he accepted:

NEW ORLEANS, *June 22d*, 1872.

26 I hereby authorize and empower Louis F. Générés, of this city, to sell for cash, on the most advantageous terms, the minimum price, however, to be not under sixty-eight cents on the dollar, all the certificates of indebtedness and warrants of the State of Louisiana pledged by O'Fallon and Hatch to the following parties, to wit:

Fifty thousand ($50,000) certificates of indebtedness pledged to D'r W. N. Mercer, to secure a loan of twenty-five ($25,000,) past due

Twenty-five thousand ($25,000) State warrants pledged to John A. Turnell, to secure a loan of twelve thousand five hundred dollars, ($12,500,) past due.

Ten thousand dollars ($10,000) certificates of indebtedness pledged to the New Orleans Savings Institution, to secure a loan of five thousand ($5,000) dollars, past due.

Four thousand three hundred and twenty $\frac{72}{100}$ ($4,320.72) dollars certificates of indebtedness pledged to L. F. Générés to secure a loan of twenty-five hundred, ($2,500,) past due.

The amount realized from these sales to be deposited with the parties holding the pledges, subject to all rights which they have upon said certificates and warrants, and without prejudice to the rights of either party or any party claiming surplus until their respective claims
27 have been proved before a register in bankruptcy and allowed, said sale to be made within a reasonable time, M'r Générés to be entitled to a commission of one-fourth of one per cent. on the gross amount of the warrants.

(Signed) ROB'T K. WOODS,
Assignee in Bankruptcy of O'Fallon & Hatch.

That sales could not be made at the limit mentioned in said document.

That on the 26th day of August, 1872, plaintiff wrote to Générés, who received the letter, as follows:

S'T LOUIS, *Aug. 26th*, 1872.

L. F. GÉNÉRÉS, Esq.,
New Orleans, L'a:

DEAR SIR: I hereby withdraw the authority which I gave you to sell the Louisiana State warrants held by you and your clients as collateral security for claims vs. O'Fallon & Hatch until the several claims are duly proved before M'r Register Lucien Eaton, of this city, and allowed by him under the bankrupt law, when a price may be agreed upon.

Very truly,

28 (Signed) ROB'T K. WOODS,
Assignee of O'Fallon & Hatch, Bankrupts.

That during December, 1871, and January, 1872, certificates could be sold in the market of New Orleans at fifty cents on the dollar.

That on the 27th day of February, 1872, certificates could be sold at sixty-one cents on the dollar.

That during March, 1872, they were worth sixty-five cents on the dollar.

That defendant has not filed proof of his claim against O'Fallon & Hatch with the district court for Missouri, or the register, or assignee.

And now, in consideration of the foregoing facts, it is ordered, adjudged, and decreed that judgment be entered in favor of the defendant, with costs.

(Signed) E. H. DURELL, *Judge.*

29 *Plaintiff's bill of exceptions.—Filed June 16th*, 1874, *nunc pro tunc as of March 3rd*, 1874.

U. S. circuit court, 5th circuit & district of Louisiana.

R. K. WOODS, ASSIGNEE OF O'FALLON & HATCH,
vs.
D'R W'M N. MERCER. } No. 6887.

Be it remembered that at the argument of this cause, after the defendant had offered in evidence without objection the note and act of pledge referred to in his answer filed in this cause, the counsel of the plaintiff moved the court to reject the note and act of pledge aforesaid from consideration, because the said note had never been proved up against the estate of O'Fallon & Hatch in accordance with the bankrupt law, and ought not to be recognized as a debt against said estate in this suit; which motion the court refused, and admitted the same in evidence; to which the plaintiff then and there excepted, and presented this bill of exceptions, and prays that the same may be signed and sealed by the court as of date of March 3rd, 1874.

[L. S.] E. H. DURELL, *Judge.*

30 *Motion and order making Yeatman & Moore parties plaintiffs.—Extract from the minutes April 14th, 1875.*

Circuit court of the United States, fifth circuit and district of Louisiana.
November term, 1874.

NEW ORLEANS, *Wednesday, 14th April*, 1875.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

R. K. WOODS, ASSIGNEE OF O'FALLON & HATCH, *vs.* D'R W'M N. MERCER. } No. 6887.

SAME *vs.* JOHN A. TURNELL. } No. 6888.

SAME *vs.* SAM'L SMITH & CO. } No. 6889.

SAME *vs.* L. F. GÉNÉRÉS. } No. 6890.

SAME *vs.* NEW ORLEANS SAVINGS INSTITUTION. } No. 6886.

On motion of Given Campbell, attorney for plaintiff in aforesaid causes, and upon suggesting to the court that the plaintiff in said suits, Robert K. Woods, died on the 14th of February, 1874, and that
31 James E. Yeatman and James C. Moore, both of Saint Louis, Missouri, were duly appointed and qualified as his successors in the office of assignees of aforesaid bankrupt estates, as will appear from a duly-certified copy of the deed of assignment to them from the Hon. Samuel Treat, judge of the district court of the United States for the eastern district of Missouri, which deed is herewith filed as Exhibit A, hereto attached,

Ordered, That said James E. Yeatman and James C. Moore, assignees as aforesaid, be made parties plaintiff herein, instead of said Woods, and that they be authorized to prosecute these suits as plaintiffs.

Deed of assignment, Exhibit A.—Filed with motion April 14th, 1875.

In the district court of the United States for the eastern district of Missouri. In bankruptcy.

IN THE MATTER OF THE COPARTNERSHIP OF O'Fallon and Hatch, and of James J. O'Fallon & Samuel A. Hatch, individually, bankrupts. } No. 949.

32 The court having on this the twenty-fourth day of February, A. D. eighteen hundred and seventy-four, made the following order in the above-entitled matter, to wit:

The death of Robert K. Woods, assignee of the copartnership estates of O'Fallon & Hatch, a copartnership heretofore composed of James J. O'Fallon and Samuel A. Hatch, and assignee also of the individual estates of said O'Fallon & Hatch respectively, having been duly suggested to the court by James E. Yeatman, co-assignee of said estates, it is, on motion of said Yeatman, ordered that James C. Moore be appointed co-assignee of said Yeatman, and that said Yeatman and Moore be, and they are hereby, appointed, confirmed, and approved as assignees of the estates aforesaid so far as the same remain undisposed of.

Now, therefore, know all men by these presents that James E. Yeatman and James C. Moore, of the city of S't Louis, in the county of Saint Louis and State of Missouri, have been duly appointed assignees in said matter.

Now, therefore, I, Samuel Treat, judge of said district court, by virtue of the authority vested in me by the 14th section of an act of Con-
33 gress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, do hereby convey and assign to James E. Yeatman and James C. Moore, assignees aforesaid, so far as the same have been heretofore undisposed of, all the estates, real and personal, of the said copartnership of O'Fallon & Hatch and of the said James J. O'Fallon and Samuel A. Hatch, bankrupts aforesaid, including all the property of whatever kind of which they were possessed, or in which they were interested or entitled to have on the ninth day of September, A. D. 1871, with all their deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said section of said act.

To have and to hold all the foregoing premises to the said James E. Yeatman and James C. Moore and their heirs forever. In trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness whereof I, Samuel Treat, judge of said court, have
34 hereunto set my hand and caused the seal of said court to be affixed this twenty-fourth day of February, A. D. 1874.

[SEAL.] (Signed) SAMUEL TREAT.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true copy of the deed of assignment to J. E. Yeatman and J. C. Moore in the matter of James J. O'Fallon and S. A. Hatch, bankrupts, in bankruptcy, as fully as the same remains on file and of record in said matter in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this 9th day of April, in the year of our Lord eighteen hundred and seventy-five.

[SEAL] (Signed) JOSEPH H. CLARK,
Clerk of said Court.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Samuel Treat, judge of the district court of the United
35 States in and for the eastern district of Missouri, hereby certify that Joseph H. Clark, whose signature appears to the within

certificate, is, and was at the date thereof, the clerk of said court, and that said certificate is in due form.

In witness whereof I hereunto subscribe my name, at office in the city of Saint Louis, in said district, this 9th day of April, in the year of our Lord eighteen hundred and seventy-five.

(Signed) SAMUEL TREAT.

Motion and order making Butler and Shields parties defendants.—Extract from the minutes April 14th, 1875.

ROB'T K. WOODS, ASSIGNEE, &C., *vs.* D'R W. N. MERCER. } No. 6887.

On motion of Given Campbell, attorney for James E. Yeatman and James C. Moore, the parties plaintiffs in aforesaid cause, assignees of O'Fallon and Hatch, and upon suggesting to the court that since the rendition of the judgment in this cause the said defendant has died, and that Pierce Butler and Wilmer Shields have duly qualified as executors of his last will and testament, it is ordered that said
36 Pierce Butler and Wilmer Shields be made parties defendant herein, and that a copy of this motion and order be served on said defendants.

Marshal's return.

Received April 15th, 1875, by the U. S. marshal, and on the 16th day of same month and year served a copy of within motion on Pierce Butler named herein, by handing the same to him in person.

New Orleans, April 20th, 1875.

(Signed) S. W. REED,
D'y U. S. Marshal.

Received April 15th, 1875, by the U. S. marshal, and, after diligent search and inquiry, Wilmer Shields within named could not be found.

(Signed) S. W. REED,
D'y U. S. Marshal.

Motion and order granting writ of error.—Extract from the minutes, April 15th, 1875.

R. K. WOODS, ASSIGNEE, &C., JAMES E. Yeatman & James C. Moore, assignees of O'Fallon & Hatch, substituted, *vs.* PIERCE BUTLER AND WILMER SHIELDS, executors of D'r W. N. Mercer. } No. 6887.

37 On motion of Given Campbell, attorney for plaintiffs in this cause, and upon suggesting to the court that the said plaintiffs feel aggrieved by the final judgment rendered in said cause against them on the 3rd day of March, 1873, and signed on the seventh day of March, 1873, and that they believe there is error to their prejudice in said judgement rendered as aforesaid, and that they desire a writ of error from said judgment, returnable in the Supreme Court of the United States on the second Monday of October next, it is ordered that the said plaintiff in said cause be allowed a writ of error as prayed for, on giving bond for the sum of five hundred dollars for costs, with good and solvent security.

Bond for writ of error.—Filed April 15th, 1875.

U. S. circuit court.

JAMES E. YEATMAN & JAMES C. MOORE, assignees of O'Fallon & Hatch, plaintiffs in error,
vs.
PIERCE BUTLER AND WILMER SHIELDS, executors of D'r W. N. Mercer, defendants in error.
} No. 6887.

38 Know all men by these presents that we, James E. Yeatman and James C. Moore, assignees of O'Fallon & Hatch and the individual members thereof, James J. O'Fallon and Samuel A. Hatch, bankrupts, as principals, and Archie Woods, as surety, are held and firmly bound unto Pierce Butler and Wilmer Shields, executors of D'r William Newton Mercer, deceased, and F. A. Woolfley, clerk of the circuit court of the United States for the fifth judicial circuit and district of Louisiana, in the full and just sum of five hundred dollars, to be paid to the said Pierce Butler and Wilmer Shields, executors of said D'r W'm Newton Mercer, deceased, and F. A. Woolfley, clerk of said court, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court wherein James E. Yeatman and
39 James C. Moore, assignees of O'Fallon and Hatch, are plaintiffs, and Pierce Butler and Wilmer Shields, executors of said D'r W'm Newton Mercer, deceased, are defendants, judgment was rendered against the said plaintiffs; and the said plaintiffs having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Pierce Butler and Wilmer Shields, executors of said D'r W'm Newton Mercer, deceased, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said James E. Yeatman and James C. Moore, assignee' of O'Fallon & Hatch, shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue:

(Sign'd) JAMES E. YEATMAN, [L. S.]
" JAMES C. MOORE, [L. S.]
Assignees of O'Fallon & Hatch.
(Signed) ARCHIE WOODS. [L. S.]

Sealed and delivered in the presence of—
(Sign'd) F. B. VINOT.

Approved.
(Signed) W. B. WOODS, *Judge.*

40 *Assignment of errors.—Filed April 16th, 1875.*

U. S. circuit court, district of Louisiana.

R. K. WOODS, ASSIGNEE, &C., JAMES E. YEATMAN and James C. Moore, assignees, &c.,
vs.
PIERCE BUTLER AND WILMER SHIELDS, EXECUTORS, &c., of D'r W. N. Mercer, deceased. } No. 6887.

Now comes James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, bankrupts, made plaintiffs herein, and say that there is manifest error in the judgment of the circuit court in aforesaid cause, and assign as errors—

1. That upon the pleadings, finding of facts, and the record in this cause according to the law of the land, there should have been a judgment in favor of plaintiffs as prayed for in the petition in said suit.

2. The court erred in refusing to reject from its consideration as evidence in said cause the note and acts of pledge as set forth in the bill of exceptions taken by plaintiff at the time, and made part of the record.

41 3. Because the court in recognizing defendants as *a* creditor of said estate of O'Fallon & Hatch, they having refused to prove up their debt in bankruptcy.

4. Because, upon the facts found, and the laws of the land, the failure and refusal of defendant to deliver to the representative of the district court of the United States for the eastern district of Missouri the property claimed in the plaintiff's petition, was a conversion of said property by defendant, for which he was liable in law to said plaintiffs, and the court erred in rendering a judgment in favor of defendant as a creditor of the estate of O'Fallon & Hatch, until he had proved up a debt against said estate according to law in such cases made & provided.

(Sign'd) GIVEN CAMPBELL,
Att'y for Pl'ffs.

42 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 41 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Robert K. Woods, assignee, &c., James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, bankrupts, versus D'r W. H. Mercer, No. 6887 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 10th day of August, A. D. 1875.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due

form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 10th day of August, A. D. 1875.

W. B. WOODS, *Judge.*

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between James E. Yeatman and James C. Moore, assignees of O'Fallon & Hatch and the individual members thereof composing said firm, to wit, James J. O'Fallon and Samuel A. Hatch, bankrupts, plaintiffs, and Pierce Butler and Wilmer Shields, executors of D'r William Newton Mercer, deceased, defendants, a manifest error hath happened, to the great damage of the said James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, and the individual members of said firm, bankrupts, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6887. James E. Yeatman & James C. Moore, assignees of O'Fallon & Hatch, pl'ffs in error, versus Pierce Butler & Wilmer Shields, executors of D'r W'm N. Mercer, defendants in error. Writ of error. Filed April 15th, 1875. F. B. Vinot, d'y cl'k.

44 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Pierce Butler and Wilmer Shields, executors of D'r William N. Mercer, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch and the individual members

thereof composing said firm, to wit, James J. O'Fallon and Samuel A. Hatch, bankrupts, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

W. B. WOODS, *Judge.*

45 (Indorsed:) Pierce Butler & Wilmer Shields, ex'rs. United States circuit court. No. 6887. Ja's E. Yeatman & Ja's C. Moore, assignees of O'Fallon & Hatch, pl'ffs in error, vs. Pierce Butler & Wilmer Shields, executors of D'r W'm N. Mercer, def'ts in error. Citation.

Marshal's return.

Received Apr. 16, 1875, by the U. S. marshal, and on the same day, month, and year served a copy hereof on Pierce Butler, executor of D'r William N. Mercer, deceased, by handing the same to him in person in this city. Wilmer Shields, the other ex'r, after diligent search and inquiry, I could not find.

S. W. REED,
D'y U. S. Marshal.

S. W. Reed, sworn, says: I am a deputy U. S. marshal, & made service of the within citation on Pierce Butler, as stated in my return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn and subscribed before me this 11th day of May, 1875.

F. B. VINOT,
U. S. Comm'r.

46 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Pierce Butler and Wilmer Shields, executors of D'r William N. Mercer, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein James E. Yeatman and James C. Moore, assignees of O'Fallon and Hatch, and the individual members thereof composing said firm, to wit, James J. O'Fallon & Samuel A. Hatch, bankrupts, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-five.

W. B. WOODS, *Judge.*

47 (Indorsed:) To Wilmer Shields, ex'r. United States circuit court. No. 6887. Ja's E. Yeatman & Ja's C. Moore, assignees of O'Fallon & Hatch, pl'ffs in error, vs. Pierce Butler & Wilmer Shields, executors of D'r W'm N. Mercer, defendants in error. Citation.

Marshal's return.

Rec'd April 17, 1875, by the U. S. marshal, and after diligent search and inquiry, Wilmer Shields, ex'r within named, could not be found.

S. W. REED,
D'y U. S. Marshal.

(Indorsement on cover:) No. 190. James E. Yeatman and James C. Moore, assignees in bankruptcy of James J. O'Fallon and Samuel A. Hatch, composing the firm of O'Fallon & Hatch, plaintiffs in error, vs. Pierce Butler & William Shields, executors of Doctor W. N. Mercer, deceased. Louisiana C. C. U. S. Filed 12th October, 1875.

Supreme Court of the United States,

March Term, 1877.—No. 190.

JAMES E. YEATMAN & JAMES C. MOORE, Assignees in Bankruptcy of O'Fallon & Hatch,

vs.

PIERCE BUTLER and WILLIAM SHIELDS, *Ex'ors of Dr. W. N. Mercer, Deceased.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF LOUISIANA.

GIVEN CAMPBELL,
Attorney for Appellants.

ST. LOUIS:
C. R. BARNS, BOOK AND JOB PRINTER, 215 PINE STREET.
1877.

Supreme Court of the United States.

October Term, 1877.—No. 190.

JAMES E. YEATMAN & JAMES C. MOORE, Assignees in Bankruptcy of O'Fallon & Hatch.

vs.

PIERCE BUTLER and WILLIAM SHIELDS, *Ex'ors of Dr. W. N. Mercer, Deceased.*

Appeal from the Circuit Court of the United States, District of Louisiana.

THE PLEADINGS STATED.

On the 18th of January, 1873, Robert K. Woods, Assignee in bankruptcy of James J. O'Fallon and Samuel A. Hatch, and of the firm of O'Fallon & Hatch, bankrupts under a decree of the District Court of the United States for the Eastern District of Missouri, filed his petition in the Circuit Court for the District of Louisiana, for the recovery of $36,000, the value of ten certificates of indebtedness which he alleged were, at the date of the adjudication in bankruptcy, the property of the bankrupts, and passed by assignment to him; that at the time they were in possession of Dr. William N. Mercer, the defendant, who had no title to them; that possession had been demanded from the defendant on several occasions by a receiver appointed by the Missouri Court, and by plaintiff, and possession was refused; but defendant unlawfully converted them, to the damage of the plaintiff in the sum of $36,000, their value at the date of conversion with prayer for judgment and *general relief.*

To this the defendant answered admitting the possession of the ten certificates of indebtedness of the State of Louisiana described in the petition, but alleging that he held them as pledgee, under a pledge from O'Fallon & Hatch of date 22d July, 1871, to secure three notes of same parties, dated July 10th, 1871, one for $10,000, due January 5th, 1872, and one for $10,000, due 10th January, 1872, and one for $5,000, due 12th January, 1872, that the notes and pledge were taken for value in due course of business.

Upon the trial a jury was waived and the cause tried by the court, who, upon the facts found, rendered judgment for defendant. Subsequently, Robert K. Woods died, and the present plaintiffs were made parties plaintiff.

The facts are meagrely stated in the finding of the court and the only controversy is upon the law of the case.

THE ASSIGNMENT OF ERRORS AND GROUNDS UPON WHICH A REVERSAL OF THE DECREE SHOULD BE HAD, AND A DECREE IN FAVOR OF PLAINTIFFS RENDERED IN THIS COURT.

1. That upon the pleadings and finding of facts by the court, and the law judgment ought to have been rendered for plaintiff in said cause.

2. The court erred in overruling the motion of plaintiff for the rejection from the consideration of the court of the note and pledge mentioned in the bill of exceptions, and in admitting defendant as a creditor of said estate before it had proved its debt in bankruptcy.

The facts as found by the court may be briefly stated as follows: O'Fallon & Hatch were adjudged bankrupt November 27, 1871. Previously they had borrowed money from the defendant and pledged the warrants to secure their notes for $10,000, due January 5th, 1872; for $10,000, due January 10th, 1872, and for $5,000, due January 12th, 1872. After this Leonard Mathews was appointed receiver of the estate of the bankrupts by Judge Treat, of the District Court of Missouri. Under that appointment he went to New Orleans, Louisiana, the domicil of defendant, and demanded of Generes, the supposed agent of the defendant, the certificates which were refused. This was in January, 1872. The defendant was aware of the action of Generes.

That subsequently, on the 27th day of February, after the matur-

ity of the note held by the defendant, the District Court at St. Louis, upon the petition of the receiver, made another order authorizing and empowering him to sell and transfer all such warrants and certificates as might be delivered to him, at a price not less than 72 per cent. for warrants and 60 per cent. for certificates, and receive the proceeds, to be held by him subject to the order of the Court, and reserving to the holders all liens upon the proceeds upon due proof of their debts.

On the same day the receiver notified the defendant of this order to sell through L. F. Generes and demanded the possession of the certificate. Generes, refused to deliver, unless enough of the proceeds to pay his debt were left in the hands of one Kohn, in Louisiana. If this were done he agreed to deliver and prove this debt. This was not done. The certificates on that day were worth on the market 61 per cent., and during March, 1872, were worth on the market 65 per cent., and Generes notified defendant of his action and he approved of it.

On the 20th of May Robert K. Woods was appointed assignee. On the 7th of June, 1872, the District Court at St. Louis, Mo., authorized and directed him to sell at public or private sale any collaterals belonging to the estates he represented, said to be pledged and in possession of persons in Louisiana claiming to be creditors of the bankrupts. The assignee came to New Orleans and demanded of defendant the collaterals, which defendant refused to deliver unless the assignee would pay his note, which the assignee refused to do. Then the assignee authorized Generes, who was a broker, to sell the collaterals at not less than 68 per cent. on certificates of indebtedness, and this sale could not be made, and on August 26, 1872, this was revoked. Defendant never proved his claim.

POINTS OF LAW AND CITATION OF AUTHORITIES.

FIRST. *The filing of the petition in bankruptcy at once brings the property of the insolvent into the bankruptcy court, and places it in its custody and under its protection as fully as if actually brought into the visible presence of the Court.*

This proposition was affirmed under the act of 1841—see Houston vs. City Bank of New Orleans, 6 Howard 486. Norton's Assignees

vs. Boyd, 3 Howard 426,—and such is the doctrine of the court o the country under the present law.

See *In re* Sacchi 6. National Bankrupt Reporter, p. 498.
In re Davis vs. Anderson, 6 N. B. R. 150.
In re Brinkman, 7 N. B. R. 425.

Again, the leading object of the law is the speedy and equal distribution of the bankrupt estate among his creditors.

See Avery vs. Hackley, 20 Wallace 413.
Baily vs. Glover, 21 Wallace 346.

From this it follows that in order to effectually make such distribution, the court in charge should know who the creditors are. At the time of the trial of this cause in the court *a quo*, the current of authority was in favor of the doctrine that secured creditors must prove their debts in the forum of the Bankruptcy. While this has been questioned, I believe that this court has never directly decided this question. At the trial, objection was made to the consideration by the court of the note and pledge offered by the defendant, which objection was overruled and the point saved in a bill of exceptions.

It has been frequently decided that secured creditors should prove their debts.

See *In re* Bridgeman, 1 N. B. R. 312.
In re Henry C. Bolton, do. 370.
In re Biglow & Kellogg, do. 632.
In re Taylor R. Stewart, do, 278.
In re Ruehle, do. 557.
In re Snedaker, 3 do. 629.
Cavis vs. Anderson, 6 do. 579.
In re Grinnell 9 do. 29.
In re Thomas Morrison 10 do. 105.
See also North Carolina Rep., Blum., Ex'r vs. Ellis.

Such would seem to be the fair deductions from the act itself.
See R. S. 5075, 5076; 5077.

If this were not required, a dishonest debtor could securely conceal all his property under cover of fraudulent pledges, and utterly defeat the object of the law. The point made in the court below

was that this defendant had been requested to prove up its debt as a secured creditor and had refused, and hence should not be recognized as a creditor in this action. It may be, however, said that under present decisions this point is not much relied upon in this court, though not abandoned.

Again it is believed that the bankruptcy of O'Fallon & Hatch changed the relation of the parties and raised up new duties on the part of those dealing with the assets of the bankrupt estate. The *fiat* in bankruptcy *fixed* the condition of the parties, and thereafter the property of the bankrupts of every character was in *custodea legis*, and its *managemeut* in the hands of the court in bankruptcy, whose duty was to take immediate steps to protect and save the assets in furtherance of the ends of the law, i. e. the speedy and equal distribution among the creditors.

See R. S. § 5,065, Young vs. Bank of Bengal, L. R. 3 C. P. 444.
Astley vs. Guerney L. R. 4 C. P. 714.

The record shows that the learned judge of the District Court for the Eastern District of Missouri, aware that certain persons in New Orleans, of whom defendant was one, held assets of the estate under a claim of pledge, and that these assets were of a fluctuating character, took prompt steps to save them for the creditors; that he appointed an agent of the court, Leonard Matthews, to receive and sell these assets, reserving at the same time all rights which might be claimed against them, under the pledge, upon distribution; that defendant was notified of the action and wish of the court; that the time to sell had come, and that the court did dot desire to hold such speculative assets and imperil the surplus; that there was at that time a margin over the amount claimed as a lien, and ready sale could be made upon the New Orleans market. It seems plain that under these circumstances,

THIRD. *The law imposed a plaiu duty upon the defendant as pledgee to sell the collaterals and save the margin for the estate.*

1. What were the relations between the parties?

The certificates, although encumbered, were a portion of the estate, and the court certainly had the management of the property

so far as the surplus was concerned. The defendant had due notice of this, and the relation he bore to the court, representing the dual interest of the bankrupt and the unsecured creditors, was that of a sort of mandatary. The Louisiana code provides that whoever undertakes the business of another, though gratuitously, is responsible for any neglect of duty, A. A. 2,971, 2,972.

By article 2,995 every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill.

Article 2,294 prescribes that "Every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it."

Under articles 3,132 and 3,135 of the code the pledgee was forbidden to appropriate the pledge to himself.

With these provisions it would seem that if bankruptcy had not intervened, and defendant had been asked at maturity of the debt to sell the collaterials, when a margin could be made by sale, and the defendant refused, he would be liable for the damage.

And it would seem that the principle should apply with greater force in favor of the plaintiffs in this case. The defendant had express notice of the desire of the court in custody of the estate, that a sale should be made at once. His debt was mature; there would have been a handsome margin realized by sale. There was a ready market, the collaterals were of a highly unsteady character. He knew that the court had no authority to speculate upon them, and that the object of the bankruptcy was to distribute the estate among the creditors speedily. His duty to the court and the estate was that of a prudent administrator under the circumstances acting for the best interest of his principal.

See Story on Bailments § 332.

Wharton on Negligence, ed. 1874, § 670, says pawnee must exercise the diligence of a good business man, when in his particular circumstances.

Story says that a pawnee is liable for losses and increments when he has refused or omitted to perform his duty. Story on Bailments, § 334.

Equity will compel a sale by pawnee when it is clear that the property will produce more than enough to satisfy the debt. Story on Bailments, § 320.

Story Eq. Jurisprudence, §§ 1031-32-33—such, says Story, is the civil law, and such is the law of Louisiana.

See Williams v. the Schooner St. Stephen, 2 N. S. p. 24. where the court held "that it results from the contract, that if the debtor has any rights in the thing, he should have the means of enforcing them; and it is the only means of preventing injustice and oppression. If the creditor is not paid, the law makes it his duty to apply to a court of justice, and have the object appraised or sold. If he will do neither, but continue to hold in his possession the collaterals of greater value than his debt, we are satisfied that the debtor or those in his right can compel him to comply with that which the law declared to be his duty to do."

We have seen that the code forbids the creditor to appropriate the pawn. If he were permitted to hold securities of greater value than the debt, until by fluctuations of the market they were reduced below the debt, and then sell them, he could practically appropriate the pawn.

His duty to the pledger is that of *diligens paterfamilias*.

See Hartman v. Bemiss, 16 Louisiana Rep. 145.

Crocker v. Monrose, 18 Louisiana Rep. 556.

The Commercial Bank of New Orleans v. Marten, *et als*, 1 La. Annual, 444.

Godfrey Stancil vs. Gilmore & Henderson, 6 La. Annual, 763.

Evans vs. Hatcher, 10 La. Annual, p. 99.

In Tyler on Usury, p. 610, it is laid down as a general rule of law, that where a person receives bonds and notes for collection as collateral security for a debt, he is bound to use due diligence, and if they are lost through his negligence by the insolvency of the makers, he is chargeable with the amount.

In re Grinnell 9, N. B. R., 137, Judge Blatchford held that where stock was held to secure call loans, the pledgee need not obtain an order of court in bankruptcy to sell the stock pledged, and pay the surplus into court for the benefit of whom it may concern.

See also *In re* Daniel, 13 N. B. R.

In Louisiana, a wrongful assumption of a right over the property of another is a conversion—and all who convert the property of another are in bad faith.

See 7 Louisiana Annual 487, Badilo vs. Tio.

2 do 281, The Draining Co. vs. Lizardi et als.

The refusal, neglect, or omission of defendant to sell when his debts were due, and there was a margin in the collaterals, at the instance of the Missouri court who notified him of the desirability of sale, was a conversion of the surplus at least, for which defendant became liable under the law of Louisiana, and the bankrupt law, to the assignee whose title related back.

In New York it has been held that in such a case the defendant could be held for the highest price on the market up to the day of trial, which the record in this case shows was about sixty-five cents on the dollar.

Under the code practice in Louisiana, there are no distinctions in actions, they are all civil actions, and while Trover is unknown, yet an equitable action for damages in such a case is allowed under the flexible system in that State, wherein the court can grant suitable redress; and it is submitted that upon the facts found there should have been a judgment under any circumstances for the amount of surplus upon the pawn in the hands of the defendant on the 28th day of February, 1872, the date of the demand by the receiver of the court as for a conversion on that day.

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